

ORDER GRANTING

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHRISTIAN T. ALVAREZ,

Petitioner,

vs.

M.D. MCDONALD, Warden,

Respondent.

No. C 10-5744 RMW (PR)

ORDER GRANTING  
PETITIONER'S REQUEST TO  
DISMISS UNEXHAUSTED  
CLAIM; ORDER TO SHOW  
CAUSE

Petitioner, a state prisoner proceeding pro se, filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On October 25, 2011, the court granted respondent's motion to dismiss for failure to exhaust and directed petitioner to elect one of three options. On February 29, 2012, petitioner wrote a letter to the court requesting the status of his case. On March 28, 2012, the court sua sponte granted petitioner an extension of time to make his election, in light of the fact that he never received the initial order. On April 25, 2012, petitioner again contacted the court, alleging that he did not receive the initial order. On May 5, 2012, petitioner filed a pleading entitled "Election by Petitioner," in which he chose to delete his unexhausted claim and proceed with his exhausted claims. Due to petitioner's failure to receive the court's orders, the court deems the response timely.

Accordingly, Petitioner's request to continue with only the exhausted claims (Claims 2-3), and dismiss the unexhausted claim (Claim 1) is GRANTED. The court renews its order to show cause to respondent as to why the petition should not be granted as to the remaining two

claims: (1) the trial court erred in admitting irrelevant and prejudicial criminal gang evidence, and (2) the trial court erred by giving the jury an incomplete and confusing jury instruction on attempted murder.

### CONCLUSION

1. Petitioner's request to proceed with only the exhausted claims and dismiss Claim 1 is GRANTED.

2. Respondent shall file with the court and serve on petitioner, within **sixty days** of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted. Respondent shall file with the answer and serve on petitioner a copy of all portions of the state trial record that have been transcribed previously, and that are relevant to a determination of the issues presented by the petition.

If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the court and serving it on respondent within **thirty days** of his receipt of the answer.

3. It is petitioner's responsibility to prosecute this case. petitioner is reminded that all communications with the court must be served on respondent by mailing a true copy of the document to respondent's counsel. Petitioner must keep the court and all parties informed of any change of address by filing a separate paper captioned "Notice of Change of Address." He must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.

DATED: 10/10/12

  
RONALD M. WHYTE  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

CHRISTIAN T ALVAREZ,  
Plaintiff,

Case Number: CV10-05744 RMW

**CERTIFICATE OF SERVICE**

v.

STATE OF CALIFORNIA et al,  
Defendant.

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 7, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Christian T Alvarez G-22117  
D-4/Cell-138  
PO Box 4670  
Lancaster, CA 93539-4670

Dated: June 7, 2012

Richard W. Wieking, Clerk  
By: Jackie Lynn Garcia, Deputy Clerk